UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE: HOLOCAUST VICTIM ASSETS LITIGATION FEE APPLICATION OF BURT NEUBORNE	MASTER DOCKET NO. CV. 06-983 (ERK) **OBJECTIONS OF CLASS MEMBERS TO REQUEST BY LEAD SETTLEMENT COUNSEL FOR ATTORNEYS FEES AND REQUEST FOR HEARING**

Objectors-class members David Schaecter, Leo Rechter, David Mermelstein, Alex Moskovic, Esther Widman, Fred Taucher, Jack Rubin, Henry Schuster, Anita Schuster, Herbert Karliner, Lea Weems, Israel Arbeiter, Sam Gasson, "G.K.," "L.K.," "F.K.," "D.B.," and "J.R," Nesse Godin, and the Holocaust Survivors Foundation-USA, Inc. (HSF) (henceforth referred to as "Objectors" or "US Survivor class members"),[1] through undersigned counsel, pursuant to Federal Rules of Civil Procedure 23, 54, and Local Rule 23.1, object to the fee request submitted by "Lead Plaintiffs Settlement Counsel" Burt Neuborne. The U.S. Survivors also urge the Court to hold a public hearing at which class members can speak and the attorneys can present legal argument on these issues.

INTRODUCTION

[1] "G.K.," "L.K.," "F.K.," "D.B.," and "J.R." are Holocaust Survivors who receive subsidized social services through Jewish social service agencies in South Florida, whose benefits are inadequate to meet their prescribed medical and other service needs.

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The U.S. Survivors note in connection with this filing, that Mr. Neuborne has already received $4.5 million from the German Slave Labor/Foundation litigation, an amount reported to be double his "lodestar," for work which overlapped significantly with the period of time covered by this fee request. The U.S. Survivors object to his requested compensation not only for the reasons set forth below, but because his $4.1 million request, which exceeds the $3,000,850 received by all U.S. Survivors in the Looted Assets class to date, punctuates the frustration and inequity experienced by Looted Assets class members in the U.S. throughout this case. The Objectors urge the Court to deny Mr. Neuborne's request in its totality.

Further, despite comments in past proceedings questioning the Objectors' motives for opposing Mr. Neuborne's fee request, the Court may not ignore the reality that these objections are filed on behalf of Holocaust Survivors, who are class members and who have the explicit right under the Federal Rules of Civil Procedure to object to the request (Rule 23(h)((1)) and make adversarial submissions (Rule 54(d)(2)(C)).[2] Indeed, the Court has acknowledged its awareness of widespread opposition from Holocaust Survivors to Mr. Neuborne's fee request. No amount of demeaning references to U.S. Survivors' motives or that of their counsel has any bearing on several facts which Mr. Neuborne cannot dispute. First, he is seeking fees from the pool of funds available to the class he publicly, in court filings and elsewhere, purported for over 8 years to represent on a "pro bono" basis. Second, his time records reflect claims for services that he has publicly, in court filings and elsewhere, declared are non-compensable. Third, he has filed a claim for time performed as to which his time records, on their face, establish that some of the work he allegedly performed was not contemporaneously recorded, and that some of the work he allegedly performed was in fact not performed for the class he purported to represent. Fourth, he seeks inflated compensation for work as to which the benefits claimed, or his direct role in obtaining, are questionable. Fifth, he seeks compensation at an extraordinarily high hourly rate of $700 per hour, even though he is a tenured law professor with a full time salary, no overhead or other expenses, and no financial risk.

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[2] Mr. Neuborne's prior filings contain a number of personal attacks on the U.S. Survivor Objectors' counsel. These comments were obviously designed to divert the Court's attention from the facts which bear on his entitlement to attorneys' fees in any amount, let alone at the unprecedented hourly rate which he seeks.

ARGUMENT

I. Procedural Issues

A. Notice of Mr. Neuborne's Fee Request Must be Directed to the Class in a Reasonable Manner Under Rule 23(h).

Mr. Neuborne opposes the application of Rule 23(h)(1) so as to require reasonable notice to the class of his fee request. Letter from Samuel Issacharoff to the Honorable Edward R. Korman, February 10, 2006. However, under the rules, notice of class counsel's fee request must be "directed to class members in a reasonable manner." The Court does not have the discretion to ignore the rule as Mr. Neuborne suggests. Rule 23(h) provides:

> (1) **Motion for Award of Attorneys Fees**. A claim for an award of attorneys fees and nontaxable costs must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision, at a time set by the court. *Notice of the motion must be*

> *served on all parties, and for motions by class counsel, directed to class members in a reasonable manner.*

(Emphasis supplied).[3] Subdivision (h) was added in 2003. It is mandatory.

The Class members have the right to rely on the duly enacted Rules of Civil Procedure, without regard to Mr. Neuborne's preferred construction. As the Supreme Court held in *Amchem Products, Inc., v. Windsor*, 521 U.S. 591 (1997):

> [C]ourts must be mindful that the Rule as now composed sets the requirements they are bound to enforce. Federal Rules take effect after an extensive deliberative process involving many reviewers: a Rules Advisory Committee, public commenters, the judicial Conference, this Court, the Congress. See 28 U.S. C. Section 2073, 2074. *The text of the rule thus proposed and reviewed limits judicial inventiveness. Courts are not free to amend a rule outside the process Congress ordered, a process properly tuned to the instruction that rules of procedure 'shall not abridge any substantive right."* Section 2072.

Id., at 620. (Emphasis supplied).

Mr. Neuborne argues that Rule 23(h)(1) does not apply because the case was initiated prior to the adoption of the 2003 amendments, and because one notice has already been made to the class. He says he is aware of "no case that has followed" the "exceedingly formal reading of amended Rule 23" advanced by the U.S. Survivors and by the Class.[4] However, there are in fact a number of recent decisions applying Rule 23(h)(1) to class

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[3] The Advisory Committee Notes to the 2003 Amendments state, in relation to Rule 23(h)(1): "Because members of the class have an interest in the arrangements for payment of class counsel whether that payment comes from the class fund or is made directly by another party, notice is required in all instances." The right of class members to object is also made explicit in subsection (h)(2): "A class member, or a party from whom payment is sought, may object to the motion."

[4] Letter from Robert A. Swift to the Honorable Edward R. Korman, February 9, 2006.

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counsel fee requests in cases filed before its effective date. These cases were catalogued in *Cobell v. Norton,* 2005 WL 3466712 (D.D.C. Dec. 19, 2005)(no internal page citations available). In *Cobell*, the Court held, in a case filed in 1996, tried to judgment in 1999 and affirmed on appeal in 2001, that class counsel's motion for attorneys fees was subject to Rule 23(h)(1) and was required to be directed to the class in a reasonable manner.

Like Mr. Neuborne, Plaintiffs' counsel in *Cobell* opposed giving notice to the class of their fee request, arguing "the notice requirements of Rule 23(h)(1) do not apply to the Interim Fee Petition because the rule only became effective on December 1, 2003 – long after the initiation of this litigation . . . ." *Id.* The Court rejected that argument:

> Plaintiffs' argument is unpersuasive as it overlooks the fact that Rule 23(h), as a procedural rule, may be "applied in suits arising before their enactment without raising concerns about retroactivity." [citation omitted]. *Keeping faith with this principle, courts have consistently applied Rule 23(h) to litigation initiated before its enactment.* *See, e.g. In re Livent, Inc., Noteholders Securities Litig.*, 355 F.Supp.2d 722 (S.D.N.Y. 2005)(Securities Class Action Complaint filed on Oct. 09, 1998); *In re WorldCom, Inc., ERISA Litig.*, 2004 WL 2338151 (S.D.N.Y. Oct. 18, 2004)(ERISA class action filed on June 21, 2002); *Latino Officers Ass'n City of New York, Inc. v. City of New York*, 2004 WL 2066605 (S.D.N.Y. Sept. 15, 2004)(Title VI action filed in September 1999).

(Emphasis supplied).[5]

The court in *Cobell* examined the issue of what notice was "reasonable" under the circumstances. It held that the notice must provide "class members with sufficient

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[5] The Chief Justice's transmission of the 2003 Amendments to the Rules of Civil Procedure in accordance with section 2072 of Title 28, United States Code, states that the 2003 amendments "shall take effect on December 1, 2003, and shall govern in all proceedings in civil cases thereafter commenced and, insofar as just and practicable, all proceedings then pending." 215 F.R.D. 158 (March 27, 2003).

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information to question objectionable fee requests and to scrutinize any potential conflicts of interest that arise from certain payment scenarios." *Id.*, quoting *Cobell v Norton*, 229 F.R.D. 5, 21 (D.D.C. 2005). It concluded that Rule 23(h)(1) would be satisfied by posting the fee request on the class counsel's website (which had been used throughout the litigation the primary vehicle to communicate with the trust beneficiaries), and publishing the fee petition in the three most widely read periodicals serving the Native American community.

Similarly, the Third Circuit held the 2003 amendments to Rule 23 applied to a case filed before the effective date of the rule. *In re Rite Aid Corp. Securities Litig.*, 396 F.3d 294 (3d Cir. 2005). *Rite Aid*, a securities class action, was filed in 1999, settled in 2000, appealed in 2001, renegotiated, and re-approved in May of 2003 after a notice to the class which included class counsel's request for fees of 25% of the settlement. The court cited the 2003 amendment (Rule 23(e)(4)(A)) as supporting a class member's standing to object to and appeal the fee award. It also noted the applicability of other provisions of the 2003 amendments, including provisions of Rule 23(h).

Accordingly, the U.S. Survivors submit that Mr. Neuborne's complete fee request, including all time entries, should be posted on the Court's website, www.swissbankclaims.com, and that a notice be published informing class members of the availability of the entire fee application and opposing filings on the website in major periodicals serving the Holocaust survivor community. That notice should also include a summary of the request, including the key elements such as the total payment requested, the

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period of time covered, the number of hours claimed by year, and the hourly rate claimed.[6] The notice should inform class members of their right to object or comment on the fee request, the address for submitting their comments, a deadline for submissions, and the date, time, and place of the hearing. Such a notice program could be effected for a relatively reasonable amount, probably in the range of $50,000. The proposal would not only have the benefit of complying with Rule 23(h) and Rule 54, but it would accord the class members their due respect by informing them of the requested payment from the settlement fund and allowing them to voice their support or objections.

Mr. Neuborne also argues that Rule 23(h)(1) does not apply because the original settlement notice provided for a cap on attorneys fees that would exceed the sum already awarded to other class counsel, as well as the sum he currently seeks. This argument also fails, based solely on the terms of the Class Notice he relies upon. That Notice states: "The court appointed attorneys as Settlement Class Counsel, ... Certain attorneys will apply to the Court for reimbursement of their costs, up to about .2% of the Fund. Certain Plaintiffs' attorneys will also apply for fees, up to at most 1.8% of the Fund. The Court may award a lower amount. *Most attorneys will not apply for fees*, . . ." *See* Issacharoff Letter of February10, 2006 (Emphasis supplied).

The Notice on which Mr. Neuborne relies states that "most attorneys will not apply for fees." At the time of that notice, which was approved by the Court in May of

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[6] According to the Advisory Committee Notes to the 2003 Amendments to Rule 23(h)(2): "[t]he rule does not specify a time limit for making an objection. In setting the date objections are due, the court should provide sufficient time after the full fee motion is on file to enable potential objectors to examine the motion."

1999,[7] Mr. Neuborne had unqualifiedly proclaimed himself to be one of the attorneys who was not applying for fees. *See* Memorandum of Law Submitted by Burt Neuborne, June 16, 1997 (Exhibit F to Fee Petition); Declaration of Burt Neuborne, November 5, 1999 at 17-21 (Docket No. 367)("Neuborne November 1999 Declaration"). This Court echoed Mr. Neuborne's status as a "pro bono" lawyer for the class. *In re Holocaust Victim Assets Litig.*, 270 F.Supp.2d 313, 322 (E.D.N.Y. 2002); *In re Holocaust Victim Assets Litig.*, 105 F.Supp.2d 139, 146 (E.D.N.Y. 2000). According to the Court and Mr. Neuborne's subsequent declarations, the other lawyers whose firms were not seeking fees were Melvyn Weiss and Michael Hausfeld. *Id.*

The reading of the 1999 notice Mr. Neuborne advances would simultaneously render the notice itself to be false. The notice states that "most attorneys will not apply for fees." Yet Mr. Neuborne, one of the three lawyers in the case who did not previously apply for fees, is now seeking them. And Mr. Weiss, one of the other two lawyers whose firm did not seek fees, has now declared his intention to seek fees as well for post settlement work. Therefore, under Mr. Neuborne's theory, the very notice that apprised the class that "most lawyers would not seek fees" can now be interpreted by the Court to mean that *all but one* of the lawyers in the case will seek fees.

Mr. Neuborne also argues that the notice established a "cap" on the total amount of fees which in effect obviates the need for a new notice because his requested fees would not exceed the "cap." Yet, the same notice also says, in conjunction with the statement that most lawyers are not going to seek fees, that "[t]he Court may award a lower amount." Clearly, the cap on fees stated in the old notice does not create a legal entitlement on Mr. Neuborne's part to recover fees without a notice to the class of his request as required by Rule 23(h)(1). Mr. Neuborne cannot simply read out inconvenient provisions of the prior notice and rely on those that might give credence to his current opposition to following the rule.

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[7] Order Appointing Notice Administrators, Approving Forms of Notice and Notice Plan, Scheduling Exclusion Requests and Objection Deadlines, and Scheduling Final Fairness Hearing, May 10, 1999 (Docket No. 277).

Finally, the authorities cited by Mr. Neuborne's counsel do not support the argument that Rule 23(h)(1) is inapplicable to the current fee request. They are cases relating to the notices required by the Private Securities Litigation Reform Act of 1995 ("PSLRA") when plaintiffs who sought to be named lead plaintiffs in accordance with the provisions of the statute, changed their application for that appointment. The statute is silent on the point. The cases cited have no applicability to the question before this Court, which involves the plain application of the clear terms of Rule 23(h) to Mr. Neuborne's fee request.

B. Hearing Requested

As noted above, the U.S. Survivor Objectors request that this Court hold a full hearing on Mr. Neuborne's fee request, at which class members have the opportunity to address the Court and the attorneys can present legal arguments. Under Local Rule 23.1 of the Rules of the Eastern District of New York, "[f]ees for attorneys or others shall not be paid upon recovery or compromise in a derivative or class action on behalf of a corporation or class except as allowed by the court after a hearing upon such notice as the court may direct." Therefore, the Court has no discretion about the necessity of a hearing on Mr. Neuborne's fee request. The fact that the Court may be aware of the opposition of the

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overwhelming majority of class members who are aware of the request does not justify denial of those class members' right to speak before the Court in a public courtroom about their opposition. The amendments adding Rule 23(h) and the Committee Notes thereto leave no doubt that the class members' rights to object to fee requests are a vital part of the class action process today, and the local rule requiring a hearing is not optional.

II. Substantive Objections

A. Mr. Neuborne's fee request is barred by judicial estoppel.

1. Neuborne relied on his "pro bono" status to defend the settlement and the allocations process and courts cited that status in their rulings.

Mr. Neuborne has repeatedly represented that he is serving as "Lead Plaintiffs' Settlement Counsel" on a "pro bono" basis, or "without fee," or having "waived fees." Those representations were made in this Court, in the Second Circuit Court of Appeals, in the U.S. District Court for the Southern District of Florida, and in numerous publications.[8] Those representations have been integral to Mr. Neuborne's arguments

[8] *See, e.g.* Declaration of Burt Neuborne Concerning the Award of Attorneys Fees, February 22, 2002; Letter from Burt Neuborne to Leo Rechter, President of the National Association of Jewish Holocaust Survivors (NAHOS. Inc), July 9, 2002; Letter from Burt Neuborne to Alex Moskovic, President, Child Survivors/Hidden Children of the Holocaust, Inc., July 10, 2002; "Students Help Holocaust Victims Recover Funds," *University of Virginia Law School*, www.law.virginia.edu/home2002/html/news/2001/holocaust.htm; "Lawyers Want Millions as Cut of Holocaust Settlement," *The Plain Dealer*, August 15, 2000; Joseph Berger, "Creative Counsel," *New York University Law School Magazine*, Autumn 2004, www.law.nyu/pubs/edu/magazine/autumn 2004, at 19; Lead Settlement Counsel's Brief Opposing the Holocaust Survivor Foundation USA, Inc.'s Opposition to the District Court's Allocation of the Settlement Fund, in *Friedman v. Union Bank of Switzerland*, Case No. 04-1898 and 1899 (CON) in the United States Court of Appeals for the Second Circuit ("*Swiss Bank Allocation Appeal*"), at 14, 61-62; Lead Settlement Counsel's Brief

justifying the entire settlement scheme, including the current allocation, and his opposition to the U.S. Survivors' efforts to obtain a greater allocation of Looted Asset Class settlement funds in this case. Mr. Neuborne is barred from recovering any fees in this case because he previously represented in this Court and in the Second Circuit Court of Appeals that he was acting on behalf of the Plaintiff-Class *pro bono,* and both courts accepted his position.

Moreover this Court, in rejecting Objectors' attorney's application for attorneys fees and expenses incurred in representing the interests of various class members including the U.S. Survivors and Survivor groups and Thomas Weiss, M.D., explicitly cited and relied upon Mr. Neuborne's status (among other lawyers) as acting "pro bono" or "without fee."[9]

In Opposition to Samuel J. Dubbin's Request for Attorney's Fees and Expenses, *Friedman v. Union Bank of Switzerland*, Case No. 04-1898 and 1899 (CON) in the United States Court of Appeals for the Second Circuit, at 4, note 3; Filing of Burt Neuborne on behalf of Hungarian Objectors, "Reservations Concerning Attorneys Fees," in *Rosner v. United States of America*, Case No. 01-1859, in the United States District Court for the Southern District of Florida ("*Rosner")* July 21, 2005, at 5 and footnote 4; Transcript of Fairness Hearing in *Rosner*, September 26, 2005, at 28-30; November 5, 1999 Declaration of Burt Neuborne; June 26, 2000 Supplemental Declaration of Burt Neuborne in Support of Fairness of the Settlement; February 20, 2004 "Affirmation of Burt Neuborne; Brief of Plaintiffs-Appellees in Response to Appellants Julia Becker Lenini, et al. and the Estate of Nathan Katz in *Lenini v. Friedman*, Appeal Nos. 00-9217, 9593, 9595, 9612, 9613 (CON) in the United States Court of Appeals for the Second Circuit, June 15, 2001, at 22, note 51, available at 2001 WL 34117787; Reply Brief of Burt Neuborne in *Zeisl and Neuborne v. Watman*, Appeal No. 01-9229 (CON) in the United States Court of Appeals for the Second Circuit, February 28, 2002, at 30, note 28.

[9] *See In re Holocaust Victim Assets Litig.*, 270 F.Supp.2d 313 (E.D.N.Y. 2000). *See also* Lead Settlement Counsel's Brief In Opposition to Samuel J. Dubbin's Request for Attorney's Fees and Expenses, *Friedman v. Union Bank of Switzerland*, Case No. 04-1898 and 1899 (CON) in the United States Court of Appeals for the Second Circuit, at 4, note 3, and citations therein.

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The Court similarly relied on Mr. Neuborne's supposed pro bono status in its fee decisions for other counsel in the case.

Throughout this litigation, before this Court and the court of appeals, Mr. Neuborne argued that due to his lack of any financial interest in the outcome, the settlement and allocation process satisfied Federal Rule of Civil Procedure 23, due process requirements, and applicable ethical considerations. This Court relied explicitly on Mr. Neuborne's "pro bono" status and his articulated role as the class representative for all classes without a financial interest in a "fair allocation process" in upholding the settlement and allocations.[10] Mr. Neuborne's brief relied on the "unique" allocation process in which "pro bono" class counsel including himself represented "the class" without any economic interest or conflict. The Second Circuit cited Mr. Neuborne's "pro bono" status in its decision affirming the Looted Assets Class allocations challenged by U.S. Survivors.[11]

Mr. Neuborne is judicially and equitably estopped from now seeking to be *personally* compensated from the very settlement funds which he so adamantly opposed being used to benefit class members – poor Holocaust Survivors in need of basic life supporting services – who live in the United States. If the Court awards Mr. Neuborne the sum he is allegedly seeking, he would have *personally* received more money per year ($700,000) from the Swiss settlement fund for his "labor on behalf of the Plaintiff-Class," as a reward for opposing the rights and interests of American Survivors, than the average annual amount of funds allocated by the Court (which Neuborne supported and defended) for *all Survivors in the Looted Assets class living in the United States* who are elderly, sick, and too poor to provide for their basic life-sustaining needs. ($600,000 including funds for Canada).

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[10] *In re Holocaust Victim Assets Litig.*, 302 F.Supp.2d 89, 92 (E.D.N.Y. 2004). *In re Holocaust Victim Assets Litig.*, 105 F.Supp.2d 139, 146 (E.D.N.Y. 2000); *In re Holocaust Victim Assets Litig.*, 2000 WL 33241660, *1, *4 (E.D.N.Y. Nov. 22, 2000).

[11] *In re Holocaust Victim Assets Litig.*, 2005 WL 2175955, *3 (2d Cir. Sept. 9, 2005).

The U.S. Survivors have, since Mr. Neuborne failed to honor the commitment he made to them to induce the withdrawal of their original allocation appeal in May of 2001, been perplexed at the numerous, and conflicting roles he has been playing. He claimed to represent the entire class but vigorously opposed the efforts of approximately 30% of the class (and 20% of the world Survivor population) to receive a fair share of the Looted Assets Class funds.[12] He claimed to represent the "Plaintiff-Class" but opined on several occasions that he was bound to defend the Special Master's recommendations and the Court's decisions if they were "within their discretion," regardless of the harm inflicted on his "clients" by such recommendations or decisions.[13] As part of the Second Circuit Court proceedings, this Court acknowledged that in fact Mr. Neuborne actually was not representing any plaintiffs,

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[12] In so doing he also opposed the rights of Israeli Survivors who comprise a substantial percentage of the Looted Assets Class some 45% of the world Holocaust Survivor population.

Objectors note that the Court's comment during the March 3, 2006 phone conference that the "Israeli survivors" are "represented" by the Arnold and Porter law firm is not accurate. Arnold and Porter represent the Government of Israel. It is true that the Government of Israel opposes the Court's allocation formula because it is damaging and unfair to Survivors who live there. But that is not the same as being a legal representative of the class members themselves.

[13] Letter from Burt Neuborne to the Hon. Edward R. Korman, September 14, 2004.

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but was representing the Court itself.[14] This came as no surprise to the Objectors but clearly belies Neuborne's various claims to be an advocate for Holocaust survivors in the class, and to claim compensation for representing class members.

In now reversing course, Mr. Neuborne is barred by the doctrine of judicial estoppel from recovering fees from the settlement fund. *Simon v Satellite Glass Corp.*, 128 F.3d 68, 71 (2d Cir. 1997)("Judicial estoppel prevents a party in a legal proceeding from taking a position contrary to a position the party has taken in an earlier proceeding."); *AXA Marine and Aviation Ins. Ltd. v. Seajet Ind.*, 84 F.3d 622, 628 (2d Cir. 1996)(party who advanced an inconsistent factual position in a prior proceeding that "was adopted by the first court in some manner" is barred from changing positions.). Clearly, the elements of judicial estoppel are present because this Court has frequently cited Mr. Neuborne's "pro bono" status in its decisions and statements. *See, e.g. In re Holocaust Victim Assets Litig.*, 105 F.Supp.2d 139, 146 (E.D.N.Y. 2000); *In re Holocaust Victim Assets Litig.*, 270 F.Supp.2d 313, 322 (E.D.N.Y. 2002); Transcript of January 5, 2001 Hearing, at 11. So did the Second Circuit Court of Appeals. *In re Holocaust Victim Assets Litig.*, 2005 WL 2175955, *3 (2d Cir. Sept. 9, 2005).

In November 1999, several months *after* Mr. Neuborne now claims he had stopped working "pro bono," he defended the settlement structure, including the procedure for allocations, on the basis that he personally had "waived all attorneys fees." He argued that the class would be protected by the presence of class counsel who lacked any financial stake in the decisions due to their "pro bono" status. As he explained:

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[14] Chief Judge Edward R. Korman Memorandum dated September 13, 2004, Docket No. 2426. 2004 WL 3710212 (E.D.N.Y. Sept. 13, 2004).

> 28. [T]he structure and mechanics of the settlement agreement assures absent class members the undivided loyalty of dedicated and competent counsel, and a Court-appointed Special Master devoted to achieving the fairest possible result for members of the plaintiff classes, while avoiding unseemly and psychologically destructive formal divisions between and among victims of the Holocaust at the close of their lives. [citation omitted]. The principal structural impediment to undivided loyalty in certain recent class actions has been the potential conflict between and among entrepreneurial counsel, who may have a financial interest in fees generated by an expeditious settlement; the defense bar intent on assuring a global settlement; and the interests of absent class members in continued litigation. Similarly, ***concerns have been expressed that the financial interests of entrepreneurial class counsel may cause counsel to favor certain class members at the expense of others in setting the terms of any settlement. Such a "divided loyalty" structural concern is completely absent from this case. Key members of the plaintiffs' Executive Committee who negotiated the settlement are providing their services on a pro bono basis,*** at most requesting that in lieu of attorneys fees payments be made to law schools to endow Holocaust Remembrance Chairs in honor of class members who failed to survive, and to foster international human rights law designed to prevent future human tragedies. ***Numerous lawyers, including Lead Settlement Counsel, have waived all attorneys fees. . . . No possibility exists, therefore, of a significant financial conflict of interest between counsel and any class member.***

Declaration of Burt Neuborne, November 5, 1999 (Docket No. 367)("Neuborne November 1999 Declaration"), at 17-18 (emphasis supplied).

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Mr. Neuborne stated, in the present tense, that "key members" of the plaintiffs' Executive Committee "*are* providing their services on a pro bono basis," and that *he* specifically had "waived *all* attorneys fees." (Emphasis supplied). He did not differentiate between a time prior to February 1, 1999 and the future, nor could any construction of his words otherwise so conclude. This Court adopted Mr. Neuborne's position and cited Mr. Neuborne's pro-bono status frequently. *In re Holocaust Victim Assets Litig.*, 270 F.Supp.2d 313, 322 (E.D.N.Y. 2002); *In re Holocaust Victim Assets Litig.*, 105 F.Supp.2d 139, 146 (E.D.N.Y. 2000).

It was equally clear that Mr. Neuborne touted his "pro bono" status as being central to the allocation phase of the case as well to the settlement itself:

> 33. Even more important than the practical impediments to using separate counsel to represent each subclass and generation, were the adverse social and psychological consequences of such a formal division of Holocaust victims into rival interest groups squabbling over a settlement fund that all agree is inadequate to provide full compensation to the victims. The members of the plaintiff classes are elderly victims of an unparalleled human catastrophe. At the close of their lives, it would be socially and psychologically irresponsible to pit one group fo Holocaust victims against another in an unseemly battle for a larger share of a limited settlement fund that cannot do real justice to all. Instead, ***freed from any structural conflict of interest caused by financial self-interest, each plaintiffs' counsel pledged to assist the Special Master by making all relevant factual material, and by providing any necessary legal assistance in an effort to be fair to all class members. If the Court approves the settlement agreement, the process of allocation will then go***

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> ***forward in a scrupulously fair, but non-adversarial manner that respects the rights and dignity of class members.***
>
> 34. ***While such an effort to temper the formal adversary process by imposing overlapping, non-adversary responsibilities on counsel may not be appropriate in other settings, under the unique circumstances of this litigation, the fourfold safeguards of (a) dedicated pro bono lawyers pledged to assist in the development of the fairest plan of allocation;*** (b) a Special Master appointed to assure the development of the fairest possible plan; (c) careful procedures encouraging participation by class members in shaping the final plan of allocation and distribution; and (d) a knowledgeable District Judge who participated fully in the negotiations, and who will ultimately pass on the fairness of any allocation plan, ***satisfies Rule 23, the commands of due process, and the ethical demands of this unique effort to invoke the class action mechanism on behalf of elderly Holocaust victims who lack the resources to assert legal claims of their own.***

Neuborne November 1999 Declaration, at 20-21(emphasis supplied).

Mr. Neuborne has repeated or referenced this argument throughout the litigation, before this Court and the Second Circuit, in defense of the Special Master's recommended allocations and in defense of the Court's approval of the Special Master's recommendations. Supplemental Declaration of Burt Neuborne in Support of An Application for an Order Pursuant to Rule 23(e) Approving The Settlement Agreement As Fair, Adequate, and Reasonable, June 26, 2000 (Docket No. 632), at 7, paragraph 12; Supplemental Declaration of Burt Neuborne in Response to Objections to the Special Master's Interim Report and Recommendation Filed by Samuel J. Dubbin, Esq., November 14, 2003 (Docket No. 1866), at 31 and note 23; February 20, 2004 Affirmation of Burt Neuborne; Lead Settlement Counsel's Brief Opposing the Holocaust

Survivors' Foundation USA, Inc.'s Opposition to the District Court's Allocation of the Settlement Fund, *Friedman v. Union Bank of Switzerland*, Case No. 04-1898 and 1899 (CON) in the United States Court of Appeals for the Second Circuit ("*Swiss Bank Allocation Appeal*"), at 6, 13-14, 21, 27, 49, 52, 60-62; Lead Settlement Counsel's Brief In Opposition to Samuel J. Dubbin's Request for Attorney's Fees and Expenses, *Friedman v. Union Bank of Switzerland*, Case No. 04-1898 and 1899 (CON)(Attorneys Fee Appeal) in the United States Court of Appeals for the Second Circuit, at 4, note 3.

Today, it is clear that the basic premise underlying Mr. Neuborne's defense of the settlement and allocation structure is false, and was false at the time he filed his various declarations and submissions. It now appears from the documents filed in support of his fee petition that Mr. Neuborne had been expecting all along to be paid from the same settlement fund in which he formerly claimed no financial interest, and that he would expect such compensation to be approved by the same district court whose rulings he has claimed he is bound to defend if "within the Court's discretion."[15] Although shocking to the Objectors, the current fee petition, and the expectation of compensation Mr. Neuborne has evidently harbored for his efforts in defense of the Special Master and the Court, suggest that the class members have been profoundly and cynically defrauded. So have the courts and the public.

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[15] Among the startling facts the Court must confront in this present motion is that while Mr. Neuborne was asserting in court that he was "waiving all fees" and acting pro bono on behalf of "the class" in filings such as his November 5, 1999 Declaration in Support of the Settlement Agreement, he was, according to his current declarations, keeping his time with the intention of seeking compensation for that very work. *See, e.g.* time entries for October 23-November 5, 1999.

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3. Neuborne's explanations are totally inconsistent with his in-court and out-of-court statements including statements in court as recently as September 200.

Mr. Neuborne now defends his fee request on the ground that he intended all along to seek fees after February 1, 1999, citing a footnote in an article he allegedly "circulated widely" (no dates given) which was published in a law review in late 2002. Supplemental Neuborne Declaration, at 4-5. However, this obscure reference does not constitute a judicial statement, nor could it supersede all of his inconsistent prior and subsequent judicial statements which refer to his "pro bono" status in the litigation.

The Objectors, and the class, had every right to rely on Mr. Neuborne's numerous record representations that he was representing 'the class" on a "pro bono" basis. After all, he has a duty of candor to the tribunal, the parties, and the judicial system. *Board of License Comm'rs of Tiverton v. Pastore*, 469 U.S. 238, 240 (1985)("It is appropriate to remind counsel that they have a continuing duty to inform the Court of any development which may conceivably affect the outcome of the litigation."); *Fusari v. Steinberg*, 419 U.S. 379, 391 (1975)(Burger, C.J., concurring)("This Court must rely on counsel to present issues fully and fairly, and counsel have a continuing duty to inform the Court of any development which may affect an outcome."); *Cleveland Hair Clinic, Inc., v. Puig*, 200 F.3d 1063, 1068 (7th Cir. 2000); *Burns v. Windsor Ins. Co.*, 31 F.3d 1092, 1095 (11th Cir. 1994); *United States v. Shaffer Equip. Co.*, 11 F.3d 450, 452, 462 (4th Cir. 1993); *Martinez v. Barasch*, 2004 WL 1555191, *4 (S.D.N.Y. July 4, 2004). *See also* 22 NYCRR 1200.3, New York State Code of Professional Responsibility, DR-1-102 ("A lawyer shall not . . . engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.").

Mr. Neuborne also now argues that "[t]he documents clearly distinguish Mr. Neuborne [sic] pre-settlement role from his post-settlement role as Lead Counsel," and other arguments advanced in his Supplemental Declaration of January 31, 2006, is simply not substantiated by the record.[16] The inferences he now would ask the Court and Holocaust survivors to indulge are totally inconsistent with all of his court filings in this case and in the Second Circuit Court of Appeals. Considering Mr. Neuborne's numerous claims on the record of "pro bono" status, if he intended seek fees at some time in the case, he had a duty to say so forthrightly, on the record, contemporaneously in this litigation. He never did.[17] As numerous courts have held, a lawyer's omission of a critical fact violates the duty of candor no less than an affirmative misrepresentation. "An attorney may breach the fiduciary duty of candor through silence as well as through an affirmative misrepresentation." *Hartsell v. Source Media*, 2003 WL 21245989, *6 (N.D. Tex. Mar. 31, 2003), quoting *Am. Int'l Adjustment Co. v. Galvin*, 86

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[16] When the Court appointed Special Master Gribetz on March 31, 1999, and Special Masters Volcker and Bradfield on December 8, 2000, its Orders spelled out the basis on which they would be eligible for compensation. These Orders were entered more than two months (in Gribetz's case) and eighteen months (in Volcker and Bradfield's case) after Mr. Neuborne now contends he changed hats, but no similar order was ever entered acknowledging the agreement Mr. Neuborne now claims he had with the Court.

Objectors' counsel has sought clarification regarding the alleged understanding between Mr. Neuborne and the Court from Mr. Neuborne's counsel, i.e. whether it was memorialized in writing, transcribed, etc. Letter from Samuel J. Dubbin, P.A., to Samuel Issacharoff, February 9, 2006. Counsel responded: "There are no documents, transcripts or writings on conversations referenced in the Dubbin letter of 2/9/06. We do not have any record of when such conversation(s) occurred, only that these comments arose during the innumerable interactions between Mr. Neuborne and the Court." Email dated February 10, 2006 from Samuel Issacharoff to Sam Dubbin.

[17] Mr. Neuborne's Supplemental Declaration makes no effort to explain his failure to update court filings referring to his "pro bono status."

F.3d 1455, 1460 (7th Cir. 1996). *See also United States v. Gotti*, 322 F.Supp.2d 230, 237 (E.D.N.Y. 2004); *Schindler v. Issler & Schrage*, P.C., 262 A.D.2d 226, 229; 692 N.Y.S.2d 361, 362 (1999); *Guardian Life Ins. Co. v. Handel*, 596 N.Y.S.2d 304; 190 A.2d 57 (1993)(where officer of the court has a duty of candor to the tribunal, silence may constitute fraudulent concealment); *Gum v. Dudley*, 202 W.Va. 477; 505 S.E.2d 391 (1997).

Mr. Neuborne's last-ditch justification of his newly announced position is based on the transcript of a hearing on January 5, 2001 at which several attorneys from the case discussed the framework for making fee applications. He argues that the Court's reference to the difference between pre-settlement and post-settlement work and reference to work that Mr. Neuborne did post-settlement, somehow qualifies as an official, in-court statement that *he would be seeking fees for "post settlement" work notwithstanding all of his prior representations*, that he was acting pro bono and had "waived all fees" and lacked "any financial interest" in the settlement or the allocations. This argument also fails.

First, the January 5, 2001 transcript is completely lacking in any affirmative statement that Mr. Neuborne would personally be seeking compensation for post-settlement work. There is no valid reason for him not to have made such a definitive declaration to that effect except, perhaps, his desire to conceal his economic motives while continuing to reap the acclaim he avidly courted and received as the "pro bono" counsel for the Swiss bank class. If his status had changed, he had a duty to say so, at the earliest possible time. And, since Mr. Neuborne has declared that he changed status as of February 1999, his sudden reliance on the January 5, 2001 hearing transcript fails to explain why the two-year delay in "announcing" his change. Clearly, he is grasping at straws.

Moreover, all but one of the attorneys who applied for fees after the January 5, 2001 hearing included their time incurred after the settlement, in most cases all the way through the end of 2000. But Neuborne did not file for any "post settlement" work which by that time had covered a period of nearly two full years. If the hearing "established" a framework for pre- and post-settlement work in connection with counsel fee requests, by what standard or principle did Neuborne choose to exempt himself from seeking fees for his post-settlement work, the same way all other class counsel did?

It is very telling that none of Mr. Neuborne's colleagues from the Plaintiffs Executive Committee, including those who have filed declarations supporting his fee request, would state that they learned from footnote 22 of the 2002 law review article, or from the January 5, 2001 hearing, or from any other statement, that Mr. Neuborne informed them he would be seeking fees for "post settlement" work. Instead, not surprisingly since many of the statements are made under oath, they state, using double negatives, that they had no reason to believe Mr. Neuborne would not seek fees for his "post settlement" work. *See* Declaration of Morris Ratner at 2; Declaration of Melvyn Weiss at 1-2. *See also* Declaration of Irwin B. Levin and Richard Shevitz, at 1-2, paragraph 3. Moreover, even if these gentlemen or other colleagues provided affirmative support of Mr. Neuborne's current claim, that would not overcome his own previous contrary assertions in and out of court.

It is apparent that the purpose of the discussion of "pre-settlement" and "post-settlement" phases was designed to address the multipliers or enhancements to counsel's lodestars that might be sought. It is common in class actions settlements for courts to apply

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enhancements to pre-settlement work but not post-settlement work, which entails less risk. The Court's opinion addressing the appropriate multiplier for Mr. Swift addresses this very point.

Mr. Neuborne's current filings make no effort to explain his failure to update court filings referring to his pro bono status. Nor do they explain his continued references – in 2001, 2002, 2003, 2004, and 2005 – to his "pro bono" representation of the Swiss bank class (and/or his "lack of financial interest in the case) long after, as he now claims, he changed that status. *See* footnote 8, *supra*. *See also* Brief of Plaintiffs-Appellees in Response to Appellants Julia Becker Lenini, et al. and the Estate of Nathan Katz in *Lenini v. Friedman*, Appeal Nos. 00-9217, 9593, 9595, 9612, 9613 (CON) in the United States Court of Appeals for the Second Circuit, June 15, 2001, at 22, note 51, available at 2001 WL 34117787; Reply Brief of Burt Neuborne in *Zeisl and Neuborne v. Watman*, Appeal No. 01-9229 (CON) in the United States Court of Appeals for the Second Circuit, February 28, 2002, at 30, note 28.

In February 2002, a full year after the January 2001 hearing, when he was defending his $4.5 million fee from the German Slave Labor arbitration, Mr. Neuborne not only reiterated his "pro bono" status in the Swiss bank litigation to the Second Circuit, but he professed only to have sought fees in *that* matter because it would have "a minimal impact on funds available to Holocaust victims." He said:

> Neuborne, who had appeared pro bono in both the Swiss bank litigation and the German slave labor cases, initially declined to submit an application for fees in connection with his work in establishing the German Foundation. When colleagues pointed out the under the unique/ceiling nature of the arbitration agreement, an award would have a minimal impact on funds available to Holocaust victims, Neuborne filed a fee application.

Hence, Mr. Neuborne not only failed to inform the Second Circuit that his "pro bono" work had ceased *three years previously* (as he now contends), but professed he only sought fees in the German case because they would not come at the expense of Survivors.[18]

As recently as September 26, 2005, in an open courtroom, in the presence of numerous Holocaust survivors who are class members in this case, Mr. Neuborne represented: "I served without fee in the Swiss case. I am the Lead Settlement Counsel in the Swiss case in which I served without fee for almost seven years." Transcript of Fairness Hearing in *Rosner v. United States of America*, Case No. 01-1859 in the U.S. District Court for the Southern District of Florida, at 28-29, attached as Exhibit 10 to Objectors' January 19, 2006, Notice of Filing. *See also* "Reservations Concerning Attorneys Fees," at 5, attached as Exhibit 9 to Objectors' January 19, 2006 Notice of Filing. His alleged service "without fee" in the Swiss bank class action was central to the premise of his initial objections to Class Counsel's fee request in Rosner, i.e. that there is a "Holocaust market" for lawyers who are willing to prosecute restitution cases for "sub-market" rates. He claimed to be one of the exemplars of this market based on his representation of the Swiss bank class "without fee."

When Judge Seitz asked Mr. Neuborne about his $4.5 million fee from the German Foundation Agreement, he answered in character by re-asserting that the only reason he ever asked for fees in the German case was because they would not come at the expense of Survivors. *See* Transcript of September 26, 2005 Fairness Hearing in *Rosner v. United States*. Less than six weeks later, Mr. Neuborne filed his current fee request seeking over $4 million in funds that would, if granted by this Court, would indisputably come at the expense of the Survivor class, most of whom have received no benefits from the settlement.

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[18] In his "confidential" application for fees to the German Foundation, Mr. Neuborne stated, in response to Objectors' inquiry, that he disclosed that he would be seeking compensation for post-settlement work in the Swiss bank case. Assuming the accuracy of the representation (Mr. Neuborne's counsel said he was quoting from a document he did not produce), it is outrageous that Mr. Neuborne would tell the German arbitrators in a *confidential filing* something he would not tell the class members in this case, or the Second Circuit Court of appeals in several *subsequent* filings. Yet this revelation is consistent with Mr. Neuborne's concealment of this vital information.

4. Payment from settlement funds is improper because Mr. Neuborne chose to represent the Special Master and the Court, not the class.

In May of 2001, some of the Objectors herein (and others) withdrew their appeals of the original allocation plan when Mr. Neuborne agreed, in writing, to support greater allocations for the U.S. Survivor community in the Looted Assets class in subsequent distributions. The secondary distributions, Mr. Neuborne stated, "will be pursuant to scrupulously fair and transparent procedures, and will, I anticipate, be presided over by Judah Gribetz as a Special Master, and ultimately by Judge Korman." May 15, 2001 Letter from Burt Neuborne, Esquire to Samuel J. Dubbin, Esq. (Docket No. 989). Mr. Neuborne's failure to abide by his commitment to support greater funding for US Survivors was difficult enough for Objectors to accept on the obvious level that they believed Mr. Neuborne broke a promise on which they relied. Mr. Neuborne's subsequent explanation of his position, in which he defended the Special Master and the Court's decisions rather than advocate for his "clients," centered around his alleged responsibility as Lead Plaintiffs Settlement Counsel acting pursuant to a "unique" and "historic" settlement and allocation construct elaborately and repeatedly described throughout these

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proceedings, including the appeals, premised in large measure on his "pro bono" status, and the absence of economically conflicted lawyers acting "on behalf of the class."

The results and current fee request leave little doubt that Mr. Neuborne abandoned a substantial part of his "clientele" for the money he previously said would not influence his actions. To highlight this point, Mr. Neuborne's time records reflect hundreds of hours in consultation with the Special Master and the Court, during times when the allocation issues affecting Objectors were being decided – and not in public hearings. In many cases the time records explicitly reflect discussions between Mr. Neuborne and the Special Master, or with the Court, addressing open issues of vital concern to Objectors and other class members. Those issues had been raised in public court filings and were supposed to be handled under "scrupulously fair" and transparent procedures.[19] Unfortunately, these protections were denied Objectors and thousands of their fellows in the Looted Assets Class, in violation of Rule 23, due process, and Mr. Neuborne's ethical obligations to the class and to the judicial system.

B. Reasonable Hourly Rate If Fees Are Not Precluded

The U.S. Survivor Objectors' initial submission dated January 12, 2006 adopted Mr. Swift's arguments in opposition to the hourly rates and calculation of the lodestar asserted by Mr. Neuborne. At the March 3, 2006 phone conference, the Court requested further briefing on an appropriate hourly rate and stated that he would refer other factual issues arising out of the

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[19] *See, e.g.* time entries for the following dates: June 21, 26; August 20; November 19; December 9, 1999; May 19; July 7, 12; August 9, 10, 2000; June 1, 29, 2001; June 6, 8, 11, 13, 26; July 9, 21; August 2, 3, 4, 17, 22, 25; September 14, 16, 17, 26; October 1, 2, 4, 9, 10, 2002; February 22, 23, 25; March 1, 2, 10, 24; April 25; May 23; July 24; September 14, 15, 23, 25; October 22; November 14, 24; December 4, 19, 2003, March 11, 2004.

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enumerated time and work to Magistrate Ornstein. For the following reasons, and without prejudice to their argument that Mr. Neuborne is precluded from any recovery, the U.S. Survivors submit that a "reasonable" hourly rate for Mr. Neuborne, a tenured law professor with a New York University Law School salary and no overhead or expenses, is between $200 and $310 per hour.

There are many reasons why Mr. Neuborne's effort to charge Survivors $700 per hour because that is what top New York City big firm lawyers charge, is outrageous on its face. These include his lack of overhead and other expenses, his full-time academic salary, and the lack of any risk undertaken by Mr. Neuborne. Further, very few if any senior partners would be paid $700 an hour by normal clients for a case to which a lawyer billed 1,500 hours per year for 6 years. Clients would expect many of the tasks in such a matter to be handled by lower-cost partners and associates and paralegals, and most firms discount their rates for exceedingly time consuming arrangements, i.e. give clients discounted rates for a higher volume of work.

In *In re Agent Orange Product Liab. Litig.*, Judge Weinstein held that a reasonable hourly rate for a law professor seeking compensation from a common fund in a class action settlement is half-way between the rates recognized for law firm partners and law firm associates. This holding was affirmed by the Second Circuit. *Agent Orange*, 611 F. Supp. 1296, 1330 (E.D.N.Y. 1984), *aff'd* 818 F.2d 226, 230 (1987). In so holding, Judge Weinstein distinguished the same case relied on here by Mr. Neuborne, *Blum v. Stenson*, 465 U.S. 86 (1984), on several grounds.[20] One reason was that "the Blum Court's decision was based on

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[20] Objectors note that Blum allowed the "prevailing market rate" without any reductions for the lower overhead or lack of actual billing experience for public interest lawyers under a federal fee-shifting statute, and noted the public policy embodied therein

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legislative intent, a ground that is absent in common fund cases." *Id.*, at 1330. It added that use of a lower rate for professors "reflects the practical differences between the situation of the professors and those of private attorneys. Involvement in this case from the law professors' point of view presented relatively little risk. Professors do not depend on practicing law for their livelihood. . . . Professors do not need the kind of bread and butter work that a practicing lawyer requires." *Id.*

In addition, the court held that the lower rate takes into account the fact that professors, unlike the other attorneys, did not have substantial overhead costs during the five-year period of this litigation. . . . [C]ertain costs of running a law office . . . must be absorbed into the lawyers' hourly rate." It added that the difference between the professors' rate and that of the private attorney "reflects this reality." *Id*, at 1330.

Therefore, one measure of a "reasonable rate" is the mid-point between partners and associates at private law firms. Indulging Mr. Neuborne's claim that he should be paid like the best private lawyers in New York City, the applicable rate would be in the range of $300 per hour. According to prominent law firm management authority Altman-Weil, the ninth decile (highest) standard hourly billing rate for partners with over 31 years experience in New York State as of January 1, 2005 is $490 per hour. According to the New York State Bar Association publication *Economics of Law Practice in New York State*, 2004, equity partners in large New

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that Congress wanted victims of discrimiation not to be limited in their choice of counsel. Further cases recognize that in fee-shifting statutes, paying academics or public interest or government lawyers at lower rates than private attorneys due to their lower cost structure would create a windfall for defendants who engage in the wrongful conduct, contravening the remedial purpose of those underlying laws and the fee-shifting provisions put there to give victims an opportunity for vindication.

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York City firms with over 35 years experience in the 95th decile charge $510 per hour. According to Altman-Weil, the top rate for a 4-5 year associate in New York is $270 per hour; it is $270 per hour in New York City according to the bar survey. Hence, under *Agent Orange*, the maximum hourly rate Mr. Neuborne could receive in a class case is in the range of $300-$310 per hour.

Clearly, Mr. Neuborne's lack of comparable New York City overhead or other expenses is fatal to his claim of $700 per hour. According to the 2005 law firm financial benchmarking survey performed by RSM McGladrey, a leading law firm accountant and consultant in New York, net income as a percentage of fees collected by law firms in the Northeast United States in 2004 was 35.8%. Consesquently, accepting Mr. Neuborne's assumption that he should be compared to lawyers in private practice who charge $700 per hour, and assuming (unrealistically) that clients would pay a top partner at that rate for 1500 hours per year for 6 years, the adjusted hourly rate should be 35.8% of $700, or $250 per hour.

Finally, this Court has analogized Mr. Neuborne's services in this case to the situation in which a district judge is provided with private counsel by the Administrative Office of the U.S. Courts. Transcript at 9-11,citing Court's September 13, 2004 Memorandum.[21] Under this contstruct, the maximum hourly rate that is "reasonable" is the maximum rate actually paid by the Administrative Office in such situations – $200 per hour. According to its regulations, the maximum amount the AO may pay private attorneys in a mandamus action, for example, is the maximum rate payable by the Department of Justice for private counsel, which according to AO General Counsel Robert Deyling is $200 per hour. That limitation, according to Mr. Deyling, is not published outside DOJ, and is not even published in writing for the AO. But Mr. Deyling stated, from personal experience, that $200 is the maximum hourly rate payable by DOJ.

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[21] Presumably, the Magistrate will make a recommendation as to what amount of Mr. Neuborne's time falls into this category.

More fundamentally, Objectors reject the extraordinary representational structure whereby the Court suggests Mr. Neuborne may undertake a number of different roles, some of which are adversarial to the class, and still be paid from class funds. Had the Court secured representation from the AO for any of Neuborne's numerous defenses of its rulings for which he now seeks $700 per hour, the agency's budget would have paid Mr. Neuborne, not the cllass. There is no legal or moral reason to tax plaintiff class members for funds to pay a lawyer to oppose their rights and interests, especially one who betrayed those very plaintiffs and spent years and buckets of ink defending his adversarial stance on the grounds that it was justified by his "pro bono" role and his lack of financial interest in the settlement outcomes. Such fiction now exposed, cannot be rewarded, even if it was acquiesced in by the Court itself.

C. Responses to Specific Time Entries and Categories of Work

If Mr. Neuborne is not barred or estopped from recovering fees, Objectors herein address certain concerns raised by the records produced to date.[22] These concerns include questions about the number of hours claimed, the services performed, the value of the benefits

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[22] Mr. Neuborne's claim to compensation on the ground that this matter made it "impossible to continue [his] private consulting practice and limited [his] scholarly and pro bono activities" is untenable. Why should Holocaust survivors in the class pay to compensate Mr. Neuborne for his "lost" academic or pro bono opportunities?

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conferred, or the contemporaneousness of time entries.[23] In any event, these and other claims of Mr. Neuborne will, Objectors understand, be more fully developed before the Magistrate who will make recommendations to the Court if the parties do not agree.

1. Questionable Entries.

a. Mr. Neuborne seeks compensation for time on September 22, 2003: "Kingsboro – 2 hrs – describe settlement to community." The problem with this entry is that undersigned counsel (and some of the Objectors) attended the Kingsboro Community College Forum on Holocaust restitution and litigation on that date. Mr. Neuborne, although confirmed as an attendee and expected by participants, rather famously failed to appear. The organizer of the forum announced after the lunch break that Mr. Neuborne had called at the last minute to say that he would not in fact appear. Declaration of Samuel J. Dubbin, February 17, 2006, Exhibit 4.

b. Between December 3, 2004 and February 22, 2005, Mr. Neuborne claims 26.5 hours for a "Bazyler piece." This presumably means he was reviewing an article Professor Michael Bazyler was writing, or he was drafting an article for a publication of Mr. Bazyler's.

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[23] As noted in the Objections filed on behalf of the Class, Mr. Neuborne's time records depict an extraordinary amount of time during certain periods, especially for a law professor with full time teaching responsibilities who also serves as legal director of the Brennan Center at New York University Law School, and who was handling other demanding engagements such as the German slave labor/German Foundation litigation and the McCain-Feingold Campaign Finance Law litigation. To address these questions, Objectors requested information from Mr. Neuborne pertaining to the time he devoted to his other consulting engagements and academic duties during the time period for which he seeks fees here.

Objectors are seeking more information than Mr. Neuborne is willing to provide voluntarily, i.e. his declaration in support of his fee request to the German Foundation arbitrators, and time entries in the German case for periods that overlap with the time for which fees are sought in this case. *See* Letter from Samuel J. Dubbin to Samuel Issacharoff, February 17, 2006.

There is no conceivable justification for the class to pay for time Mr. Neuborne chose to devote to assist an academic colleague or to enhance his own publication resume.

c. After logging 11 hours on December 26, 1999 on "Weiss, Dunaevsky, Wolinsky, objections" for "review and analysis of pending objections likely to be pursued," and 12 hours on December 27, 1999 for "review settlement structure in light of likely objections," Mr. Neuborne claims to have devoted *two hours* on December 30, 1999 to "Dubin let. – review letter, analyze likely objection." The letter from Mr. Dubbin consisted of three sentences, and simply informed the Court that he would shortly be filing written objections to augment his comments at the November 29, 1999 Fairness hearing.

d. On December 22, 2000, soon after the filing by US Survivors of a simple Notice of Appeal of the Court's November 22, 2000 allocation decision, Mr Neuborne claims 2 hours for "Dubbin appeal – review appeal on allocation." But no issues had been presented at that time; The US Survivors did not file their Forms C and D listing the issues raised in the appeal until several days later – January 4, 2001. On the same date (December 22, 2000), Mr. Neuborne claims two hours each to review the "Schonbrun appeal" and the "Romani appeal."

e. On February 28, 2001, Mr. Neuborne claims 11 hours to "research re HSF allocation appeal/cy pres history/late night." This entry was made the same day he logged 9 hours to "research issues raised by Katz appeal/IOM process." Aside from the fact that 20 hours of work in one day is unusual, the problem with this time entry is that the U.S. Survivors' appeal was filed on December 22, 2000 in the names of several individuals and the Holocaust Survivor groups that they represented. The Notice of Appeal makes no mention of the organization "HSF." In his time records for December 2000 he claims to have entered the term "HSF" into his billing report, even though he denied any knowledge of the organization three years later. The Special Master will have to resolve whether this and other entries were made contemporaneously.

f. On August 23, 2002, Mr. Neuborne claims 3.5 hours for "conv Dubbin re allocation/discussion of his objections" and 6.5 hours "review Dubbin's objections/discuss with other counsel/Mel." That is a total of 10.0 hours on August 23, the day the undersigned sent a four (4) paragraph letter to the Court objecting to the Special Master's recommendation for the first supplemental distribution of interest on the settlement fund for the looted assets class. Although counsel called Mr. Neuborne upon his unexpected receipt of the Special Master's recommendation, the conversation certainly did not last 3.5 hours. Nor is it understandable how Mr. Neuborne spent 6.5 hours reviewing and discussing a letter which barely exceeded one page in length. (Docket No. 1341).

2. Speeches and lectures. Mr. Neuborne seeks compensation for numerous speeches to organizations or groups such as the "AJC," "ADL," "community leaders," or various judicial or academic audiences (e.g. NYU, Columbia, UVa., Millersville). Under standards previously urged by Mr. Neuborne, these hours are not compensable from the class. In 2003, he said: "it is unclear whether the members of the Swiss bank classes are an appropriate source of involuntary compensation for [counsel's] public activities on behalf of his clients' vision of the most appropriate way to seek restitution for Holocaust victims. I have expressed similar concerns to the Court in response to earlier fee applications premised on contact with the media and discussion of Holocaust-related issues with the interested community. I continue to believe that such activities are important and praiseworthy, but I question whether they qualify for an award

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of fees from the plaintiff class, especially a hourly rates of $425 per hour that are designed to provide compensation for legal expertise, not public relations." *See* Supplemental Declaration of Burt Neuborne in Response to the Amended Application of Samuel Dubbin, Esq. For Counsel Fees, July 21, 2003. ("Neuborne July 2003 Declaration").[24] Yet today, Mr. Neuborne is now seeking tens of thousands of dollars, at *$700* per hour, from the class for similar "non-legal" work.

3. Evaluation of other attorneys' fee requests. Mr. Neuborne seeks compensation for time spent reviewing other attorneys' fee requests. However, all indications were that Mr. Neuborne's services in this regard were "pro bono" as well. *In re Holocaust Victim Assets Litig.*, 270 F. Supp.2d 313, 314 (E.D.N.Y. 2002)("This case is different from other cases because some of the leading members of the class action bar agreed to prosecute the case without fee, thus altering the considerations that typically underlie the determination of an appropriate fee. Moreover, one of them, Professor Burt Neuborne, has undertaken to carefully review the fee applications of those attorneys who provided services and seek fees."). Hence, it is improper for Mr. Neuborne now to seek compensation for this time.

4. Negotiations concerning deposited assets disclosure and claims processes. Mr. Neuborne seeks compensation for hundreds of hours devoted to negotiations and court filings addressing various contours of the Deposited Assets Claims resolution (CRT) process which has yielded little in incremental dollars or information disclosure to class members. He has made no

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[24] Mr. Neuborne made that assertion even though no request for such compensation was actually at issue in July 2003; only Counsel's request for compensation for insurance-related work was pending because the request for compensation for allocations-related work had been deferred by agreement. *See* Neuborne July 2003 Declaration, at 2.

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effort to quantify the monetary benefits resulting from this work. According to the standards previously urged by Mr. Neuborne in evaluating other fee requests, services rendered are not compensable from class settlement funds unless they produce a material benefit for the class. Neuborne July 2003 Declaration, at 7-8. The Court adopted this standard. *In re Holocaust Victim Assets Litig.*, 311 F.Supp.2d 363, 376, 381, 382 (E.D.N.Y. 2004)("Not all work is entitled to be compensated, even when that work is done in the context of a lawsuit.").[25]

Unfortunately, the settlement itself contained severe limitations in the ability of class members to obtain information about deposited assets from Defendants, and on the Court's ability to sanction Defendants for denying the CRT access to adequate information to maximize recoveries by class members. The fact is that despite these many hours of negotiations and the filings, most applicants remain stymied by an opaque and frustrating process for recovering deposited assets. These frustrations and shortcomings have been described in several court orders, the Special Master's April 16, 2004 Interim Report, and filings by Mr. Neuborne. *E.g. In re Holocaust Victim Assets Litig.,* 319 F.Supp.2d 301 (E.D.N.Y. June 1, 2004); Letter from Chief Judge Edward R. Korman to Diana L. Taylor, New York State Superintendent of Banks,

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[25] Mr. Neuborne stated previously: "I do not contest the fact that [counsel] has expended substantial time on Holocaust-related issues, including the scope of the insurance releases in this case. I do not believe, however, that the plaintiff-class can be turned into in involuntary client with an obligation to pay [counsel] more than the economic value of [counsel's] services merely because [counsel] has expended time." Letter from Burt Neuborne, Esquire, to Hon. Edward R. Korman, September 9, 2003.

Objectors would ordinarily support reasonable compensation for lawyers' work that opened the door for potential recovery and enhanced the historical record and the transparency of restitution efforts, even if monetary benefits did not immediately result. *See, e.g., Koppel v. Wien,* 743 F.2d 129 (2d Cir. 1984). However, Mr. Neuborne is judicially estopped from having a different standard apply to his fee request than the one he urged for others and which this Court adopted.

August 1, 2005 (Docket No. 2785); Letter from Burt Neuborne, Esquire, to the Honorable Edward R. Korman, April 19, 2005 (Docket No. 2870). However long the hours worked by Mr. Neuborne or well-intentioned the goals of this endeavor, by his standards and the one adopted by the Court, monetary benefits from the added work are slight or nonexistent and the time is therefore not compensable from the class's funds.

5. Negotiations regarding insurance releases and claims program. Mr. Neuborne seeks compensation for time expended renegotiating the insurance releases that were initially agreed to by Plaintiffs and preliminarily approved by the Court, and fashioning a "modest insurance claims program." Neuborne Fee Petition at 5. Again, based on the standards he urged and the Court has applied, this request should be denied.

Mr. Neuborne's current petition states that the value of the insurance claims program negotiated after the modification of the settlement is approximately $1 million. To date, available information shows approximately $300,000 in successful insurance payments from the process negotiated by Mr. Neuborne.[26] Objectors contend that the potential recovery from Swiss insurers and reinsurers was far greater and his negotiations represent a major failure.[27] By

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[26] There is little available information about the full results of Mr. Neuborne's negotiations with the Swiss or the current status of the insurance program.

[27] Sidney Zabludoff, the insurance economist whose credentials in the field of Holocaust era insurance this Court recently praised, *see* Letter from Chief Judge Edward R. Korman to Diana L. Taylor, New York State Superintendent of Banks, August 1, 2005 (Docket No. 2785), estimated the value of unpaid assets from Jewish Holocaust victims in the hands of Swiss insurers and reinsurers not excluded from the original settlement to be *in excess of $2 billion* (including $427 million in direct insurance and $1.7 billion in reinsurance). *See* Declaration of Sidney J. Zabludoff, Exhibit to Modified Fee Request of Dubbin & Kravetz, LLP, March 30, 2004, cited at 311 F.Supp.2d at 377.

This Court observed in its March 31, 2004 Order that Mr. Zabludoff's estimate was not practical because it was "impossible" to sue the companies for which the releases the standards previously applied in this case, he does not qualify for compensation for work done in connection with such a result.

At the time Mr. Neuborne was negotiating with the Swiss insurers and reinsurers, he had the benefit of filings which provided considerable insight into the culpability of and possible avenues of recovery from Swiss insurers and reinsurers. His time records reflect several hours reviewing those filings.[28] Yet, in negotiating a claims process for Swiss insurers and reinsurers, Mr. Neuborne did not employ any insurance or reinsurance experts, or even any translators in the effort. Nor did he obtain any expert assessment of the aggregate value of possible Swiss insurance claims at any time, relying instead on defendants' representations. Class members have requested, and deserve, a more robust and transparent effort through which to pursue insurance assets from Swiss companies.

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were modified. The existence of litigation against some of these insurers in the U.S. calls that assumption into question. *E.g. Ward-Thg., Inc., v. Swiss Reinsurance Co.*, 1997 WL 83204 (S.D.N.Y. Feb. 27, 1997).

The point for this discussion, however, is that Mr. Neuborne's renegotiation of the insurance releases was not carried out in a way that would be expected to yield the best outcome for the class.

[28] Counsel's suggestions for a more effective mechanism to harvest insurance assets (September 1, 2000 letter) were not adopted. Counsel urged the publication of names of policy holders by any insurer or reinsurer who sought a release from the settlement, the establishment of an electronic database of class members to facilitate the matching of names and policies, and more. *See* September 1, 2000 letter. *Cf. In re Holocaust Victim Assets Litig.*, 319 F. Supp.2d 301, 327 (E.D.N.Y. 2004)(claims process is more successful where the survivors and heirs can respond to published bank account holder names rather than file blind claims in hope of a match.). Rejection of these proposals was unfortunate, especially considering that reinsurers concededly retained data about underlying policies they reinsured. *See* November 20, 2000 Letter from Burt Neuborne to the Honorable Edward R. Korman, Docket No. 813.

6. Any Fees Should Be Limited to Work Expended which Actually Generated A Financial Benefit. If Mr. Neuborne were not estopped from seeking fees for reasons explained above, then under the standards he urged for other lawyers he is would be entitled to compensation only for the work that actually yielded the claimed dollar enhancements. His alleged major financial enhancements are $5 million for litigation before Judge Block regarding compound interest, $22.5 million (plus $2.5 million) in additional interest from the "accelerated payment of $334 million to the settlement fund," and $25 million in tax savings from legislation passed as a result of his efforts with co-Plaintiffs' counsel Melvyn Weiss. *See* Supplemental Neuborne Declaration, January 31, 2006, at 11-12. His time records show that Mr. Neuborne devoted no more than 100 hours (and probably less) to the "accelerated payment" negotiations and the tax legislation. His time on the compound interest dispute is more difficult to discern, but appears relatively modest based on his narrative description of the tasks. In any event, Mr. Neuborne should receive, if anything, compensation for the time expended for the specific work generating a monetary benefit -- an amount that is orders of magnitude lower than the sum he now claims.

Further, Mr. Neuborne has the burden of proving a real financial benefit as a result of his work. His current filings are inadequate for that purpose and the record as a whole refutes his claims for mammoth financial benefits for the class. For example, he claims a benefit of $22.5 million in additional interest from the "accelerated payment of $334 million to the settlement fund." This figure is not supportable on its face, much less upon scrutiny. According to Amendment 2, the final tranche of $334 million was paid on November 23, 2000 instead of November 23, 2001. Compare Amendment 2, Section 3.4 with Settlement Agreement, Section

5.1. Therefore, the gross benefit to the class of this advanced payment was one year's interest on the $334 million. Since there has been no accounting made public of the interest earned on the settlement fund at all much less during this period, it is difficult to evaluate the facial accuracy of Mr. Neuborne's claim. However, based on a relatively liberal standard of the interest rate paid on one month CDs during that time period, the average interest rate would have been 4.3%, yielding a gross "benefit" in accelerated interest of $14.4 million.

However, it is also likely that the class lost value overall as a result of Mr. Neuborne's negotiations. . In October 2003, he stated that under Amendment 2, "in return for acceleration in the payment of the full settlement amount, the settlement fund would bear the expenses of the claims process." Declaration of Burt Neuborne in Support of Interim Report of the Special Master, October 13, 2003, paragraph 26. Although the Court has never published a detailed accounting of the Settlement Fund expenses despite Section 7.;1 of the Settlement Agreement, it is clear that the expenses of the claims process have greatly exceeded either the $14.4 million likely generated by the advanced payment, or even the $22.5 (plus $2.5) million claimed.

According to CRT Special Master Michael Bradfield, "the total budgeted expenditures for Claims Resolution Process for the 19 months from January 2001 through July 2002 . . . amount to $19, 436,470. Letter from Michael Bradfield to the Honorable Edward R. Korman, July 26, 2002. (Docket No. 1307). Monthly invoices from the CRT after that date appear to average at least $500,000. If those invoices are representative of the average amount paid from the Settlement Fund for the claims process in the succeeding forty-four months, then a minimum of $41.4 million would have been expended as a result of Neuborne's negotiation,

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clearly a net loss. And that sum does not include amounts paid in recent years to the Claims Conference for claims administration, of which the latest invoice approved by the Court totals $6,155,387 for 2005 and 2006. See Order Approving Dormant Account Class Disbursement of Funds for Administrative Expenses, March 15, 2006.

A further question raised is that Mr. Neuborne now claims credit for the Congressional action making the interest on the settlement fund accumulate tax free. However, prior filings and Court orders credit Melvyn Weiss with the lions share of the credit in persuading Congress to pass that legislation. Based on Mr. Neuborne's time records, his role appeared to be technical in nature, more as a draftsman than one whose efforts were instrumental in achieving the result. It is certainly not appropriate to suggest his few hours of drafting and discussions with legislative staff people warrant extraordinary compensation from class funds.

Conclusion

Mr. Neuborne was instrumental in engineering the "unique and historic" settlement and allocation structure premised in large part on the leadership of "pro bono" attorneys without any financial interest in decisions, and justified the settlement and allocation mechanisms to the Court of Appeals on that basis. Based on these numerous representations, in this and other courts, over a period of nearly 8 years, Mr. Neuborne should not be allowed to change his status after the fact. Even if he is deemed not to be disqualified based on his prior representations, his fee request is excessive. At best, he should receive compensation at a fraction of his $700 per hour request for the few hundred hours he worked that generated actual benefits which are far less than the amount he claims to have created. Remarkably, he instead seeks more money for

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himself from the class – $4,088,500 – than the U.S. Survivors in the Looted Assets class have received to date from those very allocations – $3,000,850. His request in the face of the desperate needs of thousands of indigent survivors in the United States who cannot afford their rent, food, medicines, or even someone to come to their home to give them a bath or prepare meals, and who have been turned away repeatedly by Mr. Neuborne and the Court for their due recovery under this class action settlement – requires the U.S. Survivors to urge this Court to reject Mr. Neuborne's fee petition.

Respectfully submitted,

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By: ______________________
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. mail upon Samuel Issacharoff, Esquire, counsel for Burt Neuborne, 40 Washington Square South, New York City, New York, 10012 this 17th day of March, 2006.

By: ______________________
Samuel J. Dubbin, P.A.